

March 31, 2011

**EX PARTE**Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554**Re: *In the Matter of Implementation of Section 224 of the Act, WC Docket No. 07-245; A National Broadband Plan for our Future, GN Docket No. 09-51***

Dear Ms. Dortch:

On March 31, 2011, John Seiver of Davis Wright Tremaine, LLP (DWT), on behalf of the State Cable Associations and Operators, spoke by telephone with Austin Schlick, General Counsel, to discuss the Commission's Order and Further Notice of Proposed Rulemaking in WC Docket No. 07-245 ("*Pole Order*" and FNPRM"). On the call I reiterated, with respect to the *Pole Order*, that pole replacement be a required technique for make-ready, and that any denial of pole replacement for "insufficient capacity" be allowed on a non-discriminatory basis only.

I explained that under 47 U.S.C. § 224(f)(2), if a utility pole owner denies an attacher access because a pole has "insufficient capacity," the pole must also be out of capacity for all in order for the denial of access to be non-discriminatory under the statute. "Non-discriminatory" access is the standard for requiring boxing and side arms and would include pole replacement if replacement is a technique the pole owner uses for itself or any other attacher to allow for capacity to host an attachment. It does not mean that the very pole for which access is sought already has a side arm, or has already been replaced; it means only that the practice is used by the utility and must be made available to all attachers. This result is also entirely consistent with the holding in *Southern Co. v. FCC*, 293 F.3d 1339 (11th Cir. 2002) and that the term "insufficient capacity" is ambiguous and subject to reasonable interpretation by the Commission.

Respectfully yours,

/s/ John D. Seiver

John D. Seiver

*Counsel for State Cable Associations and Cable Operators*

cc: Austin Schlick, Esq.